Supreme Court, U.S.
FILED
FEB 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

(5) (5)

Nos. 88-515 and 88-525

In the Supreme Court of the United States

OCTOBER TERM, 1988

SABLE COMMUNICATIONS OF CALIFORNIA, INC.,
APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION AND
RICHARD L. THORNBURGH,
ATTORNEY GENERAL OF THE UNITED STATES

FEDERAL COMMUNICATIONS COMMISSION AND
RICHARD L. THORNBURGH,
ATTORNEY GENERAL OF THE UNITED STATES,
CROSS-APPELLANTS

v.

SABLE COMMUNICATIONS OF CALIFORNIA, INC.

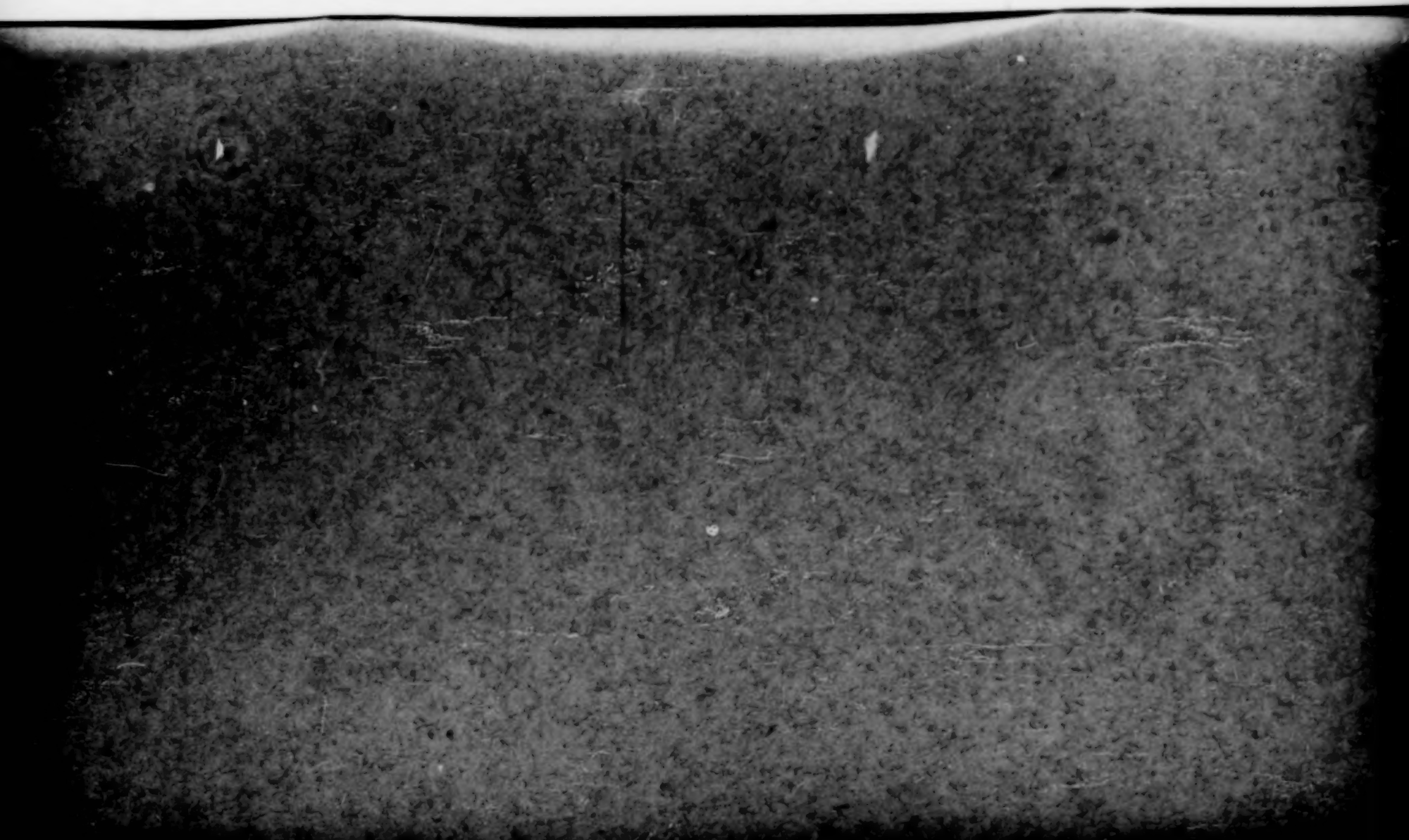
ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE CROSS-APPELLANTS/APPELLEES

WILLIAM C. BRYSON
Acting Solicitor General
JOHN R. BOLTON
Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
RICHARD G. TARANTO
Assistant to the Solicitor General
BARBARA L. HERWIG
JACOB M. LEWIS
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

DIANE S. KILLORY
General Counsel
Federal Communications Commission
Washington, D.C. 20554

57p



QUESTION PRESENTED

Whether the ban on obscene and indecent interstate commercial telephone messages contained in Section 223(b) of the Communications Act of 1934, as amended (to be codified at 47 U.S.C. 223(b)), is consistent with the First Amendment.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	2
Constitutional and statutory provisions involved	2
Statement	5
Introduction and summary of argument	18
Argument:	
I. Section 223(b)'s prohibition of indecent commercial interstate telephone communications is constitutional on its face	22
A. Congress has a compelling interest in preventing children from obtaining access to indecent as well as obscene telephone pornography	26
B. Congress reasonably determined that an across-the-board ban is the only effective means of preventing children's access to telephone pornography	32
II. Section 223(b)'s ban on obscene interstate commercial telephone messages is constitutional and should be upheld	36
A. Section 223(b)'s prohibition of obscene commercial speech is consistent with the First Amendment	36
B. The statute's ban on obscene telephone messages is severable from its ban on indecent telephone messages	43
Conclusion	46

TABLE OF AUTHORITIES

Cases: Page

Action for Children's Television v. *FCC*, 852 F.2d 1332 (D.C. Cir. 1988) 19

Action for Children's Television v. *FCC*, No. 88-1916 (D.C. Cir. filed Dec. 30, 1988, stay granted, Jan. 23, 1989) 32

Alaska Airlines, Inc. v. *Brock*, 480 U.S. 678 (1987) 22, 44

Audio Enterprises, Inc., In the Matter of, 64 Radio Reg. 2d (P&F) 1681 (Apr. 21, 1988) . 39

Bethel School District No. 403 v. *Fraser*, 478 U.S. 675 (1986) 26

Board of Airport Comm'rs v. *Jews for Jesus, Inc.*, No. 86-104 (June 15, 1987) 23

Bolger v. *Youngs Drug Products Corp.*, 463 U.S. 60 (1983) 27

Boos v. *Barry*, No. 86-803 (Mar. 22, 1988) . . . 24, 25

Brockett v. *Spokane Arcades, Inc.*, 472 U.S. 491 (1985) 18, 24, 36, 40

Broadrick v. *Oklahoma*, 413 U.S. 601 (1973) . 23

Buckley v. *Valeo*, 424 U.S. 1 (1976) 44

Butler v. *Michigan*, 352 U.S. 383 (1957) 35

Carlin Communications, Inc. v. *FCC*, 749 113 (2d Cir. 1984) (Carlin I) 6, 7, 8, 30

Carlin Communications, Inc. v. *FCC*, 787 F.2d 846 (2d Cir. 1986) (Carlin II) 6, 10-11, 28

Carlin Communications, Inc. v. *FCC*, 837 F.2d 546 (2d Cir. 1988) (*Carlin III*) cert. denied, No. 88-37 (Oct. 31, 1988) . 12, 15, 18, 32, 40, 41, 42, 44

Cases—Continued: Page

Carlin Communications, Inc. v. *Mountain States Tel. & Tel. Co.*, 827 F.2d 1291 (9th Cir. 1987), cert. denied, No. 87-1479 (Apr. 25, 1988) . . 29

Carlin Communications, Inc. v. *South Central Bell Tel. Co.*, 461 So.2d 1208 (La. App. 1984) 20

Champlin Refining Co. v. *Corporation Comm'n of Oklahoma*, 286 U.S. 210 (1932) 44

Consolidated Edison Co. v. *Public Service Comm'n*, 447 U.S. 530 (1980) 24, 26

Fabulous Assocs. v. *Pennsylvania Pub. Utility Comm'n*, 693 F. Supp. 332 (E.D. Pa. 1988) . 33

FCC v. *Pacifica Foundation*, 438 U.S. 726 (1978) . . . . . *passim*

First Nat. Bk. v. *Bellotti*, 435 U.S. 765 (1978) . 24

Fleming v. *Rhodes*, 331 U.S. 100 (1947) . . . . .

Fort Wayne Books, Inc. v. *Indiana*, No. 87-470 (Feb. 21, 1989) 37

Frisby v. *Schultz*, No. 87-168 (June 27, 1988) . 24, 28

Ginsberg v. *New York*, 390 U.S. 629 (1968) 27, 28, 29

Hamling v. *United States*, 418 U.S. 87 (1974) 21, 37, 38, 40-41, 43

Houston v. *Hill*, No. 86-243 (June 15, 1987) . . 23

Hustler Magazine, Inc. v. *Falwell*, No. 86-1278 (Feb. 24, 1988) 24

Intercambio, Inc., In the Matter of, 64 Rad. Reg. 2d (P&F) 1663 (Apr. 21, 1988) 39

Interstate Circuit, Inc. v. *Dallas*, 390 U.S. 676 (1968) 26

Cases—Continued: Page

J.W. Hampton, Jr. & Co. v. *United States*, 276 U.S. 394 (1928) 43

Miller v. *California*, 413 U.S. 15 (1973) 15, 18, 20, 36, 41, 42, 43

New York v. *Ferber*, 458 U.S. 747 (1982) 23, 26, 27

New York State Club Ass'n, Inc. v. *City of New York*, No. 86-1836 (June 20, 1988) 23

Paris Adult Theatre I v. *Slaton*, 413 U.S. 49 (1973) 36

Parham v. *J.R.*, 442 U.S. 584 (1979) 29

Perry Education Ass'n v. *Perry Local Educators Ass'n*, 460 U.S. 37 (1983) 24

Prince v. *Massachusetts*, 321 U.S. 158 (1944) . 26

Pope v. *Illinois*, 481 U.S. 497 (1987) 18

Regan v. *Time, Inc.*, 468 U.S. 641 (1984) 44

Renton v. *Playtime Theatres, Inc.*, 475 U.S. 41 (1986) 25

Rescue Army v. *Municipal Court*, 331 U.S. 549 (1947) 39

Roe v. *Meese*, 689 F. Supp. 344 (S.D.N.Y. 1988) 6

Rostker v. *Goldberg*, 453 U.S. 57 (1981) 35

Roth v. *United States*, 354 U.S. 476 (1957) . . . 20, 36

Schall v. *Martin*, 467 U.S. 253 (1984) 30

Secretary of State of Maryland v. *Joseph J. Munson Co.*, 467 U.S. 947 (1984) 24

Smith v. *United States*, 431 U.S. 291 (1977) . . 41

Cases—Continued: Page

Socialist Labor Party v. *Gilligan*, 406 U.S. 583 (1972) 39

Thompson v. *Oklahoma*, No. 86-6169 (June 29, 1988) 29

United States v. *Orito*, 413 U.S. 139 (1973) ...

United States v. *12 200-ft. Reels of Film*, 413 U.S. 123 (1973) 40

Walters v. *National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) 35

Young v. *American Mini Theatres, Inc.*, 427 U.S. 45 (1978) 25

Constitution, statutes and regulations:

U.S. Const. Amend. I ..... *passim*

Administrative Procedure Act, 5 U.S.C. 554 .. 17

Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181, codified at 47 U.S.C. 223(b) 3, 16

Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. No. 100-297, §6101 102 Stat. 424 ..... 3-4, 5, 14

Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100-690, §7524, 102 Stat. 4502 ..... 3, 5

Communications Act of 1934, 47 U.S.C. 201 *et seq.*: .....

47 U.S.C. 223(a) 45

47 U.S.C. 223(b) (Supp. IV 1986) ..... *passim*

47 U.S.C. 223(b)(1) (Supp. IV 1986) 7, 8

Constitution, statutes and regulations—Continued: Page

47 U.S.C. 223(b)(2) (Supp. IV 1986) 7, 32

47 U.S.C. 223(b)(3) (Supp. IV 1986) 8, 17, 39

47 U.S.C. 223(b)(4) (Supp. IV 1986) 8, 17

47 U.S.C. 223(b)(5) (Supp. IV 1986) 8

47 U.S.C. 402(a) 17

47 U.S.C. 503(b)(1) 17

47 U.S.C. 503(b)(1)(B) 39, 41

47 U.S.C. 503(b)(2) 39

47 U.S.C. 503(b)(3) 41

47 U.S.C. 504(a) 17, 21, 39, 41

Criminal Fine Improvements Act of 1987, Pub. L. No. 100-185, §6, 101 Stat. 1281 (to be codified at 18 U.S.C. 3571) 17

Federal Communications Commission Authorization Act of 1983, Pub. L. No. 98-214, §8(a) 97 Stat. 1470 7

Judiciary and Related Agencies Appropriations Act, 1989, Pub. L. No. 100-459, §608, 102 Stat. 2228 32

18 U.S.C. 1464 32

28 U.S.C. 2342 17

Miscellaneous:

Cable-Porn and Dial-A-Porn Control Act: Hearing on S. 1090 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. (1986) .....

129 Cong. Rec.:

p. H10,559 (daily ed. Nov. 18, 1983) 12, 34

Miscellaneous—Continued: Page

p. H10,560 (daily ed. Nov. 18, 1983) 12, 18, 38

p. E5966 (daily ed. Dec. 14, 1983) 18, 38

p. S16,867 (daily ed. Dec. 14, 1983) 34

133 Cong. Rec.:

pp. S16,794-S16,800 (daily ed. Dec. 1, 1987) 31

pp. S16,796-S16,799 (daily ed. Dec. 1, 1987) 18

pp. S16,794-S16,800 (daily ed. Dec. 1, 1987) 14

p. S17,048 (daily ed. Dec. 2, 1987) 14

134 Cong.:

p. E1111 (daily ed. Apr. 19, 1988) 38, 45

p. E3753 (daily ed. Nov. 10, 1988) 17

p. H1690 (daily ed. Apr. 19, 1988) 13

pp. H1690-H1703 (daily ed. Apr. 19, 1988) 14

pp. H1806-H1836 (daily ed. Apr. 19, 1988) 14

p. H1691 (daily ed. Apr. 19, 1988) ... 13, 33, 45

pp. H1691-H1695 (daily ed. Apr. 19, 1988) 18

p. H1699 (daily ed. Apr. 19, 1988) 7, 13, 28, 31, 45

pp. H1702-H1703 (daily ed. Apr. 19, 1988) 14

p. H1709 (daily ed. Apr. 19, 1988) 45

p. H1713 (daily ed. Apr. 19, 1988) 31, 45

p. H1806 (daily ed. Apr. 19, 1988) 45

p. S13,427 (daily ed. Sept. 28, 1988) 38

p. S4377-S4378 (daily ed. Apr. 20, 1988) . 5, 31

p. S4377 ..... 13, 31

p. S4378-S4381 (daily ed. Apr. 20, 1988) . 18

Miscellaneous—Continued: Page

p. S4386 (daily ed. Apr. 20, 1988) 14

Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, Report and Order, 49 Fed. Reg. 24, 996 (1984) 8

Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, Second Report and Order, 50 Fed. Reg. (1985):

p. 42,699 9

p. 42,701 9

p. 42,702 9

pp. 42,702-42,703 10

p. 42,703 ..... 10, 33

pp. 42,702-42,706 ..... 9, 35

p. 42,706 10

p. 42,705 9

p. 42,704 10

Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, Third Report and Order, 2 F.C.C. Rcd 2714 (1987) 6, 11, 12, 35

H.R. No. 5, 100th Cong., 1st Sess. (1987) 14

H.R. No. 4401, 100th Cong., 2d Sess. (1988) . 14

L. Tribe, *American Constitutional Law* (2d ed. 1988) 24

Note, *Children and the Recorded Message Industry: The Need for a New Doctrine*, 72 Va. L. Rev. 1325 (1986) 7, 29, 30

Miscellaneous—Continued: Page

Bureau of the Census, *Statistical Abstract of the United States 1988* (108th ed. 1988) 27, 28

Telephone Decency Act of 1987: Hearing on H.R. 1786 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce, 100th Cong., 1st Sess. (1987) 7, 13, 22, 28

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-515

SABLE COMMUNICATIONS OF CALIFORNIA, INC., APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION AND
RICHARD L. THORNBURGH,
ATTORNEY GENERAL OF THE UNITED STATES

No. 88-525

FEDERAL COMMUNICATIONS COMMISSION AND
RICHARD L. THORNBURGH,
ATTORNEY GENERAL OF THE UNITED STATES,
CROSS-APPELLANTS

v.

SABLE COMMUNICATIONS OF CALIFORNIA, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE CROSS-APPELLANTS/APPELLEES

OPINION BELOW

The opinion of the district court (J.S. App. A1-A6)[1] is reported at 692 F. Supp. 1208.

---

[1] Unless otherwise indicated, "J.S. App." refers to the appendix to the jurisdictional statement filed by the appellants in No. 88-515.

JURISDICTION

The district court's decision was issued on July 19, 1988. J.S. App. A1. Appellant/cross-appellee Sable Communications of California, Inc. (Sable), filed a notice of appeal to the United States Court of Appeals for the Ninth Circuit on July 27, 1988. J.S. App. E1. The government, cross-appellants/appellees here, filed a notice of appeal to this Court from the same decision, but as to different issues, on July 29, 1988. 88-525 J.S. App. 9a-10a. Because of the government's appeal to this Court, Sable's appeal to the court of appeals was dismissed on August 29, 1988. J.S. App. D. Sable's appeal was automatically transferred to this Court under 28 U.S.C. 1252. Sable filed a jurisdictional statement in this Court on September 26, 1988 (No. 88-515), and the government filed a jurisdictional statement on September 27, 1988 (No. 88-525). This Court noted probable jurisdiction in both cases on January 9, 1989. The Court has jurisdiction under 28 U.S.C. 1252.[2]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides: "Congress shall make no law • • • abridging the freedom of speech • • •."

---

[2] Section 1252 was repealed by the Act of June 27, 1988, Pub. L. No. 100-352, §1, 102 Stat. 662, effective September 25, 1988 (§7, 102 Stat. 664). The repeal does not affect this case, because it does "not apply to cases pending in the Supreme Court on the effective date • • • or affect the right to review or the manner of reviewing the judgment or decree of a court which was entered before such effective date." *Ibid.*

Under 28 U.S.C. 1252, this Court has jurisdiction over the government's appeal seeking review of the court's preliminary injunction, because the district court held a federal statute unconstitutional in part. See, *e.g.*, *McLucas* v. *DeChamplain*, 421 U.S. 21, 30 (1975); *Fleming* v. *Rhodes*, 331 U.S. 100 (1947). Section 1252 also provides jurisdiction over Sable's appeal, as a cross-appeal from the same district court judgment.

Section 223(b) of the Communications Act of 1934, as amended by Section 7524 of the Child Protection and Obscenity Enforcement Act of 1988 (enacted as Title VII, Subtitle N of the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181, 4485), to be codified at 47 U.S.C. 223(b), provides:

> (b)(1)(A) Whoever knowingly—
>
> > (i) in the District of Columbia or in interstate or foreign communication, by means of telephone, makes (directly or by recording device) any obscene communication for commercial purposes to any person, regardless of whether the maker of such communication placed the call; or
> >
> > (ii) permits any telephone facility under such person's control to be used for an activity prohibited by clause (i);
>
> shall be fined in accordance with title 18 of the United States Code, or imprisoned not more than two years, or both.
>
> (2) Whoever knowingly—
>
> > (A) in the District of Columbia or in interstate or foreign communication, by means of telephone, makes (directly or by recording device) any indecent communication for commercial purposes to any person, regardless of whether the maker of such communication placed the call; or
> >
> > (B) permits any telephone facility under such person's control to be used for an activity prohibited by clause (i),
>
> shall be fined not more than $50,000 or imprisoned not more than six months, or both.

Prior to its most recent amendment, Section 223(b), as amended by Section 6101 of the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School

Improvement Amendments of 1988, Pub. L. No. 100-297, 102 Stat. 424, provided:

> (1) Whoever knowingly—
>
> (A) in the District of Columbia or in interstate or foreign communication, by means of telephone makes (directly or by recording device) any obscene or indecent communication for commercial purposes to any person, regardless of whether the maker of such communication placed the call; or
>
> (B) permits any telephone facility under such person's control to be used for any activity prohibited by subparagraph (A),
>
> shall be fined not more than $50,000 or imprisoned not more than six months, or both.
>
> (2) In addition to the penalties under paragraph (1), whoever, in the District of Columbia or in interstate or foreign communication, intentionally violates paragraph (1)(A) or (1)(B) shall be subject to a fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.
>
> (3)(A) In addition to the penalties under paragraphs (1) and (2), whoever in the District of Columbia or in interstate or foreign communication, violates paragraph (1)(A) or (1)(B) shall be subject to a civil fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.
>
> (B) A fine under this paragraph may be assessed either—
>
> (i) by a court, pursuant to a civil action by the Commission or any attorney employed by the Commission who is designated by the Commission for such purposes, or
>
> (ii) by the Commission after appropriate administrative proceedings.

(4) The Attorney General may bring a suit in the appropriate district court of the United States to enjoin any act or practice which violates paragraph (1)(A) or (1)(B). An injunction may be granted in accordance with the Federal Rules of Civil Procedure.

STATEMENT

In early 1988, Congress amended Section 223(b) of the Communications Act of 1934, 47 U.S.C. (Supp. III) 223(b), to prohibit any person from making any obscene or indecent interstate telephone communication for commercial purposes. Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. No. 100-297, §6101, 102 Stat. 424. In late 1988, Congress modified certain aspects of the provision but left the prohibitions intact. Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100-690, §7524, 102 Stat. 4502. After the first enactment but prior to the second, appellant/cross-appellee Sable, a company that sells so-called "dial-a-porn" telephone services, brought a constitutional action challenging the new prohibitions contained in Section 223(b), chiefly under the First Amendment. The district court denied Sable's request for a preliminary injunction against enforcement of the statute insofar as it applies to obscene interstate commercial telephone messages. J.S. App. A4-A5. The court issued the requested preliminary injunction, however, against enforcement of the statute insofar as it applies to indecent interstate commercial telephone messages, finding the ban on such communications overbroad. *Id.* at A3, A6.

1. The current version of Section 223(b) is the culmination of recent congressional efforts to protect children against so-called "dial-a-porn"—that is, sexually explicit or suggestive messages, typically prerecorded, that are provided for a fee over the telephone. See 134 Cong. Rec. S4377 (daily ed. Apr. 20, 1988). A provider of dial-a-porn

messages arranges with a telephone company to use special telephone lines, frequently though not always with a "976" prefix (or exchange), that are designed to handle large numbers of calls simultaneously. See *Carlin Communications, Inc.* v. *FCC*, 787 F.2d 846, 850-851 (2d Cir. 1986) (*Carlin II*). The telephone company typically charges callers according to prescribed tariffs, retains a portion of the charges, and remits the remainder to the dial-a-porn company. See *Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials*, Third Report and Order, 2 F.C.C. Rcd 2714, 2715 (1987) (*Third Report*).[3]

Recorded dial-a-porn messages contain a wide range of explicit descriptions of sexual acts. The record in these cases in this Court, for example, shows that callers to the service provided by Sable's affiliate could hear recorded messages describing in graphic detail a woman having sex with a dog, a female "sex therapist" teaching her "special methods" to a young girl, and "master-slave" sex with whips and chains. See Gov't Memo. In Opp. to App. for Inj. Pending Appeal, No. A-143, Exh. A. The purveyors of dial-a-porn can and often do change their messages at least once a day.

The dial-a-porn companies aggressively market their services, and they have been extremely successful. See *Carlin Communications, Inc.* v. *FCC*, 749 F.2d 113, 114 (2d Cir. 1984) (*Carlin I*) (on the New York Telephone system alone, "800,000 calls per day were made to dial-a-porn in May, 1983; 180,000,000 calls in the year ending February, 1984");

---

[3] Other dial-a-porn companies, unlike Sable, provide live, "two-way" sex conversations with persons calling a specified number and providing a credit card number for payment. See *Third Report*, 2 F.C.C. Rcd at 2715. That form of dial-a-porn service is specifically at issue in *Roe* v. *Meese*, 689 F. Supp. 344 (S.D.N.Y. 1988) (granting preliminary injunction against Section 223(b)'s prohibition of indecent speech, but refusing preliminary injunction against section's prohibition of obscene speech). That form of service is not at issue in the present cases, as Sable's complaint here alleges only that Sable sells prerecorded messages. J.S. App. F2-F3.

Note, *Children and the Recorded-Message Industry: The Need for a New Doctrine*, 72 Va. L. Rev. 1325, 1328 (1986) (*Recorded Message Industry*) (of 27,000,000 recorded message calls on Pacific Bell in 1984, 12,000,000 went to adult entertainment messages). Because of the aggressive marketing, which includes leaving fliers on cars and distributing them throughout neighborhoods, young children are easily able to obtain the telephone numbers, and they make a substantial portion of all dial-a-porn calls. See 134 Cong. Rec. H1699 (daily ed. Apr. 19, 1988) (statement of Rep. Coats); *Telephone Decency Act of 1987: Hearing on H.R. 1786 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 100th Cong., 1st Sess. 18 (1987) (*1987 Hearing*) (statement of Rep. Coats).

2. a. Congress made its first attempt to prevent children from gaining access to dial-a-porn in 1983, just after the dial-a-porn industry was launched. In a measure sponsored by Representative Bliley (see *Carlin I*, 749 F.2d at 115-116), Congress added a new subsection (b) to Section 223 of the Communications Act of 1934, 47 U.S.C. 223(b) (Supp. IV 1986). Federal Communications Commission Authorization Act of 1983, Pub. L. No. 98-214, §8(a), 97 Stat. 1469. The provision prohibited any person from using telephone facilities to make "obscene or indecent" interstate telephone communications "for commercial purposes to any person under eighteen years of age or to any other person without that person's consent." 47 U.S.C. 223(b)(1) (Supp. IV 1986).[4] The enactment provided, however, that it would be a defense to prosecution that the defendant restricted access to adults "in accordance with procedures which the [Federal Communications] Commission shall prescribe by regulation." 47 U.S.C. 223(b)(2) (Supp. IV 1986).

---

[4] The 1983 statute and the more recent amended versions all apply "in the District of Columbia or in interstate or foreign communication." To simplify, we refer only to interstate communications.

The statute provided for criminal and civil penalties, including daily fines and up to six months' imprisonment for each violation. 47 U.S.C. 223(b)(1), (3), and (4) (Supp. IV 1986). It also authorized the Federal Communications Commission (FCC or Commission) to initiate judicial or administrative proceedings to assess civil fines. It further authorized the Attorney General to bring suit to enjoin violations. 47 U.S.C. 223(b)(4) and (5) (Supp. IV 1986).

b. Over the next four years, the FCC sought to devise regulations to define the safe-harbor defense to prosecution that was authorized by the statute. The first set of regulations would have established a defense for those dial-a-porn purveyors that operated only between the hours of 9:00 p.m. and 8:00 a.m. Eastern Time or that required payment by credit card before transmission of the message. See *Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials*, Report and Order, 49 Fed. Reg. 24,996 (1984) (*First Report*). Explaining how the regulations sought to protect children from dial-a-porn, the Commission stated its belief that, during the specified night-time hours, "a majority of parents would be available to supervise the actions of their children" (*id.* at 25,001) and that "credit cards are not routinely issued to minors without parental authorization" (*id.* at 25,000).

In *Carlin I*, *supra*, the Second Circuit set aside the regulations and remanded them to the Commission. Although the court recognized that the government's "interest in protecting minors from salacious matter is no doubt quite compelling" (749 F.2d at 121), it concluded that the operating-hours requirement was "both overinclusive and underinclusive" (*ibid.*). It explained that the regulation "denie[d] access to adults between certain hours, but not to youths who can easily pick up a private or public telephone and call dial-a-porn during the remaining hours." *Ibid.* It also found no adequate explanation "why a prohibition on dial-it services is needed during daytime school hours when children

are for the greater part of the year likely to be in class under adult supervision, while the prohibition is not needed after 9:00 p.m. Eastern Time (6:00 p.m. on the West Coast), when a young person needs to be unsupervised for only about ninety seconds in order to dial the number and hear the message." *Ibid.* The court further found that the record did not adequately explain the Commission's rejection of alternative methods of restricting access, such as "screening or blocking or using access numbers" *Id.* at 122.

c. On remand, the Commission promulgated new regulations. *Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials,* Second Report and Order, 50 Fed. Reg. 42,699, 42,701 (1985) (*Second Report*). The new regulations continued to permit prior credit card payment as a defense to prosecution. They abandoned time restrictions, however, and added instead a defense based on use of access codes, which the Commission found to be both feasible and the least burdensome means of implementing the regulatory mandate. *Id.* at 42,705. The regulations required that access codes be made available only by mail, explaining that this requirement sought to prevent children from obtaining the codes. *Id.* at 42,705 & n.38.

In accordance with the remand order, the Commission examined the options of blocking or screening telephone numbers at the customer's premises or at the telephone company offices; but it rejected those alternatives. 50 Fed. Reg. 42,702-42,706. The Commission concluded that so-called "exchange blocking," which blocks all numbers with a specified exchange (*e.g.*, "976"), would impose substantial costs on many telephone companies and would require new equipment, software, and other measures. *Id.* at 42,702. Such blocking would also block *all* "dial-it" services using the exchange, including weather and sports information (*ibid.*); at the same time, dial-a-porn services could avoid the restriction by offering their services on unblocked exchanges

(*e.g.*, other than "976") (*id.* at 42,702-42,703). As for full "line number" (seven digit) blocking, the technology for doing so was experimental, not yet universally available, and expensive; and it could not "handle the large number of 'dial-a-porn' systems currently in operation." *Id.* at 42,703. Furthermore, the Commission pointed out, "minors need only seek unsupervised telephones in residences where customers do not subscribe to the screening services to gain access to the messages." *Ibid.*[5]

The Commission was aware of the imperfections in its credit card and access code regulations. It recognized that "[n]o method guarantees that some enterprising minors will never hear the messages" and that dial-a-porn access codes and credit cards might be obtained and used by some children. 50 Fed. Reg. at 42,706 n.54. Indeed, recognizing that children were likely to obtain access codes, the Commission required dial-a-porn providers to implement plans for cancelling access codes upon notification that they had been misused (by, for example, being used by a minor). *Id.* at 42,705. Overall, the Commission concluded that its new regulations provided the "most effective method currently available to restrict access by minors without unduly impairing adults who want to hear the messages." *Id.* at 42,706 n.54.

In *Carlin II*, *supra*, the Second Circuit upheld the Commission's rejection of blocking at the telephone company offices (787 F.2d at 853), but it remanded the new regulations on other grounds. Limiting its remand decision to New York Telephone lines, the court concluded that the record did not support the FCC's ruling that access codes were the least restrictive means to regulate dial-a-porn. *Id.*

---

[5] The Commission rejected other options on similar grounds—*e.g.*, that they were not technologically and economically feasible, or that they were overbroad and unreasonably intrusive on adults' access (as in the case of scrambling devices). *E.g.*, 50 Fed. Reg. at 42,704. See page 11, *infra* (describing subsequent Commission decision regarding scrambling).

at 848, 855. The court explained that the access code requirement in fact presented substantial problems of feasibility for the New York network. *Id.* at 855. It further reasoned that the Commission had not adequately considered the feasibility of using blocking equipment at the customer's premises with the costs to be borne by the dial-a-porn providers or the telephone companies. *Id.* at 855-856.

d. In response, the FCC promulgated a third version of the regulations. *Third Report, supra.* The FCC found that, since the time *Carlin II* was decided, New York Telephone had developed a means of permitting its customers to use access codes. The new regulations therefore reinstituted the access code defense in the New York area. 2 F.C.C. Rcd at 2720. The new regulations also added on a nationwide basis a new defense of message scrambling to the already proposed defenses of credit card payment and access code use.

The Commission again rejected the use of blocking devices at the customers' premises, not only because they were too expensive, but because they were ineffective in preventing children from gaining access to dial-a-porn, given the ease of disabling the devices and the ready access to dial-a-porn through the great majority of telephones that would not have blocking devices attached. 2 F.C.C. Rcd at 2719-2720. By contrast, the Commission found that scrambling, which it had previously rejected (see note 5, *supra*), would not be burdensome for the message provider and would make dial-a-porn accessible only through telephones with descramblers, which themselves were not expensive. Having reconsidered the matter, the Commission concluded that scrambling would be effective in reducing access to dial-a-porn by minors and could be implemented at reasonable cost. *Id.* at 2720-2721. The Commission noted, however, that "absolute impossibility of access to [dial-a-porn] services * * * is not feasible." *Id.* at 2724 n.14. Moreover, the Commission acknowledged that scrambling "will not achieve the highest effectiveness unless sale of descramblers

to minors is prohibited," and it therefore urged "states to exercise their authority to prohibit sale of descramblers to minors" and "[r]etailers * * * to play a responsible role concerning [such] sale[s]." *Id.* at 2722.[6]

In *Carlin Communications, Inc.* v. *FCC*, 837 F.2d 546 (2d Cir. 1988) (*Carlin III*), cert. denied, No. 88-37 (Oct. 31, 1988), the court of appeals upheld the new regulations under the 1983 version of Section 223(b). The court concluded that they were a "feasible and effective way to serve" the "compelling state interest" in "protect[ing] minors from obscene speech" (837 F.2d at 555), although the court directed the FCC to reopen its proceedings if a less restrictive technology becomes available (*id.* at 556). The court ruled, however, that the statute itself would be unconstitutional insofar as it could be construed to restrict speech that is merely indecent rather than obscene, although the court suggested that the statute need not be so construed. *Id.* at 558-561. The court explained that the statute's "use of 'indecent' was clearly made with *FCC v. Pacifica Foundation*, 438 U.S. 726 * * * (1978), in mind." 837 F.2d at 558, citing 129 Cong. Rec. H10,559, H10,560 (daily ed. Nov. 18, 1983) (statement of Rep. Bliley). The court concluded, however, that "the *Pacifica* decision does not justify the regulation of indecent telephone messages" as opposed to broadcasting messages. 837 F.2d at 560.

3. While the FCC's regulations were under review in the Second Circuit, Congress revisited the dial-a-porn issue in light of the Commission's experience in attempting to implement the 1983 version of Section 223(b). Congress held hearings on the issues raised by dial-a-porn regulation, with a "very significant focus" on the "technological regulatory

---

[6] The Commission also required that, in order for a provider who sells messages through AT & T 900 service to obtain a defense to prosecution, it must ask AT & T that its service be subject to "billing notification"—*i.e.*, an itemization on telephone bills that specifies which particular calls were made to adult message services. 2 F.C.C. Rcd at 2722.

alternatives proposed by the FCC and others." *1987 Hearing* 2 (opening statement of Rep. Markey). See *Cable-Porn and Dial-A-Porn Control Act: Hearing on S. 1090 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. (1986). Legislators heard testimony that there were significant "engineering problems" associated with screening out calls from minors and that those problems would be eliminated by an across-the-board ban of dial-a-porn. *1987 Hearing* 62 (statement of Robert Helgesen, NYNEX Corp.); *id.* at 116 (Helgesen testimony that central office blocking of dial-a-porn services would cost approximately $35,000,000 for N.Y. Telephone alone). In addition, even opponents of a dial-a-porn ban conceded that the attempts to restrict children's access to dial-a-porn had "proven ineffective so far" and were "going to be ineffective in the future." *Id.* at 118 (testimony of Barry Lynn, ACLU).

In the end, Congress concluded that there was no sufficiently effective technological method of eliminating the access of children to dial-a-porn short of an outright ban. In the words of Representative Bliley, who had sponsored the original enactment of Section 223(b), it had become "clear that there was not a technological solution that would adequately and effectively protect our children from the effects of this material. We looked for effective alternatives to a ban—there were none." 134 Cong. Rec. H1691 (daily ed. Apr. 19, 1988). See also *id.* at H1699 (statement of Rep. Coats) ("it is not technologically possible to keep this information out of the hands of young people"); *id.* at H1690 (statement of Rep. Hall) ("the current regulations adopted by the FCC are not effective in stopping the spread of dial-a-porn to minors"); *id.* at S4377 (daily ed. Apr. 20, 1988) (statement of Sen. Hatch) ("If a so-called technological solution to the access of our children to dial-a-porn had been available, I, of course, would have supported it.").

Accordingly, after discussing the practical and constitutional questions relevant to a prohibition of indecent and obscene commercial interstate telephone messages (see, *e.g.*, 133 Cong. Rec. S16,794-S16,800 (daily ed. Dec. 1, 1987); 134 Cong. Rec. H1690-H1703, H1806-H1836 (daily ed. Apr. 19, 1988)), Congress voted to broaden Section 223(b)'s reach beyond telephone communications with minors and to eliminate the provision that permitted a defense to prosecution based on FCC regulations. Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. No. 100-297, §6101, 102 Stat. 424.[7] As amended, Section 223(b) prohibited the making of "any obscene or indecent communication * * * by means of telephone * * * for commercial purposes * * * in the District of Columbia or in interstate or foreign communication." The subsections providing for criminal and civil penalties and for injunctive relief were not changed from the 1983 version.

4. Sable, a California-based dial-a-porn company affiliated with Carlin Communications, Inc., began offering "frankly sexual" telephone messages through the Pacific Bell telephone network in 1983. 88-515 J.S. 4-5. Before the Hawkins-Stafford Act amendments to Section 223(b) were to take effect on July 1, 1988, Sable brought this suit in the United States District Court for the Central District of California, seeking declaratory and injunctive relief chiefly

---

[7] The Senate passed the dial-a-porn prohibition by a vote of 98-0 (133 Cong. Rec. S16,800 (daily ed. Dec. 1, 1987) as an amendment to the larger Hawkins-Stafford education bill, H.R. 5, 100th Cong., 1st Sess. (1987)). See 133 Cong. Rec. S17,048 (daily ed. Dec. 2, 1987) (§7003). The Senate subsequently agreed to the conference report on H.R. 5 as amended to contain the identical dial-a-porn prohibition. 134 Cong. Rec. S4386 (daily ed. Apr. 20, 1988). The House approved H.R. 4401, 100th Cong., 2d Sess. (1988), which was identical to the Senate amendment to H.R. 5, by a vote of 380-22. 134 Cong. Rec. H1702-H1703 (daily ed. Apr. 19, 1988). It then agreed to the conference report on H.R. 5 as amended to contain the provision. *Id.* at H1836.

on the ground that Section 223(b)'s restrictions on obscene and indecent speech violated the First Amendment. On Sable's motion for a preliminary injunction, the district court partly agreed and partly disagreed with the contention that Section 223(b) is unconstitutional. J.S. App. A1-A5.[8]

In declining to enjoin the enforcement of Section 223(b) as applied to obscene telephone messages (J.S. App. A4-A5), the court observed that "obscene speech is unprotected by the First Amendment" (*id.* at A4). Sable argued nonetheless that Section 223(b)'s prohibition of obscene interstate commercial telephone communications is invalid under this Court's ruling in *Miller* v. *California*, 413 U.S. 15 (1973), because, Sable contended, the statute created a national, rather than local, standard of obscenity. The district court rejected the argument. Borrowing from the Second Circuit's ruling with respect to the 1983 version of Section 223(b), the court found that the Hawkins-Stafford version did "'not create an impermissible national obscenity standard any more than do the federal laws prohibiting the mailing of obscene materials, or the broadcasting of obscene messages.'" J.S. App. A4 (quoting *Carlin III*, 837 F.2d at 561).

On the other hand, the district court issued a preliminary injunction against the enforcement of Section 223(b) as applied to indecent speech. J.S. App. A3; 88-525 J.S. App. 7a-8a. The court held that Section 223(b)'s "flat-out ban of indecent speech is contrary to the First Amendment." J.S. App. A3. In a brief discussion, the court concluded that, "insofar as it applies to 'indecent' communications,"

---

[8] Sable also challenged Section 223(b) as vague in violation of the Fourteenth Amendment. (Presumably, Sable meant to invoke the Fifth Amendment.) The district court did not separately address the vagueness argument. It simply read the statute as incorporating the definition of "obscene" set forth in *Miller* v. *California*, 413 U.S. 15 (1973), and as using the term "indecent" as the term was used in *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978).

Section 223(b)'s prohibition is "overbroad and unconstitutional." J.S. App. A3. The court reasoned that, although "the government unquestionably has a legitimate interest in, *e.g.*, protecting children from exposure to indecent dial-a-porn messages, §223(b) is not narrowly drawn to achieve any such purpose." *Id.* at A3. Explaining its view that "[w]hat is at issue is the breadth to be given to *FCC* v. *Pacifica Found.*, 438 U.S. 726 (1978)," the court concluded that *Pacifica* should be read narrowly so as not to reach outside the broadcasting context to Section 223(b). J.S. App. A3.

5. On July 27, 1988, Sable filed a notice of appeal to the United States Court of Appeals for the Ninth Circuit from the adverse ruling regarding obscene speech and sought an injunction pending appeal. J.S. App. E. The appeal was dismissed and automatically transferred to this Court when the government, on July 29, filed an appeal to this Court from the district court's ruling that Section 223(b)'s ban on indecent messages is unconstitutional. See J.S. App. C. Sable's application for an injunction pending appeal was denied by Justice O'Connor on August 30, 1988. *Sable Communications of California, Inc.* v. *FCC*, No. A-143.

On November 18, 1988, the President signed the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181. Section 7524 of the Act substituted a revised Section 223(b) for the Hawkins-Stafford Act version that was before the district court. The new statute does not alter the prohibitions contained in the Hawkins-Stafford version.[9]

The new enactment made several changes in Section 223(b). The current version continues the criminal penalties for indecent interstate commercial telephone communications, but it increases the penalties for obscene messages, providing (102 Stat. 4502) for prison terms of up

---

[9] Accordingly, these cases are not moot, and the issues presented by the district court's ruling have not changed so as to warrant a remand for further proceedings by the district court prior to this Court's consideration of the constitutional issues.

to two years and fines "in accordance with Title 18" (that is, up to $250,000 for individuals and up to $500,000 for organizations). See Criminal Fine Improvements Act of 1987, Pub. L. No. 100-185, §6, 101 Stat. 1280 (to be codified at 18 U.S.C. 3571(b)(3), (c)(3)). It also places the prohibition against obscene commercial telephone messages in a subsection ((b)(1)) separate from that containing the prohibition against indecent messages ((b)(2)). 102 Stat. 4502. In addition, the new law omits both former Section 223(b)(3), which specified that the FCC could enforce Section 223(b) through appropriate administrative proceedings and civil enforcement actions, and former Section 223(b)(4), which granted the Attorney General the power to seek injunctive relief against dial-a-porn activities. 102 Stat. 4502; see 134 Cong. Rec. E3753 (daily ed. Nov. 10, 1988) (remarks of Rep. Hughes).[10] Section 223(b) itself now contains only criminal penalties for violations of the prohibition of obscene and indecent dial-a-porn.[11]

---

[10] Notwithstanding the remarks of Rep. Hughes, the elimination of the non-criminal enforcement provisions of Section 223(b) may have been inadvertent. The government is considering proposing reenactment of those provisions as part of a bill to make technical corrections in the Anti-Drug Abuse Act.

[11] The FCC has general authority to assess a civil forfeiture for any willful or repeated violation of the Communications Act—up to $2,000 for each violation, subject to a prescribed $5,000 ceiling. 47 U.S.C. 503(b)(1) and (2). If assessed without a formal hearing, the penalty would have to be enforced through a civil suit, in which the trial would be de novo. 47 U.S.C. 504(a). In the alternative, the Commission may proceed by way of a hearing before the Commission or an administrative law judge in accordance with the Administrative Procedure Act, 5 U.S.C. 554. In that event, review of the Commission decision would be in a court of appeals pursuant to 47 U.S.C. 402(a) and 28 U.S.C. 2342. To date the Commission has not used the latter procedure in enforcing Section 223(b).

INTRODUCTION AND SUMMARY OF ARGUMENT

These cases involve the validity of Section 223(b)'s ban on both obscene and indecent commercial interstate telephone communications. In none of the versions of Section 223(b) has Congress expressly provided definitions of the terms "obscene" and "indecent." The legislative history of the 1983 and 1988 enactments makes clear, however, that Congress understood the terms as they were used in the decisions of this Court in *Miller* v. *California*, *supra*, and *Pacifica*. 129 Cong. Rec. H10,560 (daily ed. Nov. 18, 1983) (statement of Rep. Bliley); *id.* at E5966 (daily ed. Dec. 14, 1983) (statement of Rep. Kastenmeier); 133 Cong. Rec. S16,796-S16,799 (daily ed. Dec. 1, 1987) (memorandum of law); 134 Cong. Rec. S4378-S4381 (daily ed. Apr. 20, 1988) (same); *id.* at H1691-H1695 (daily ed. Apr. 19, 1988) (memorandum of law); see *Carlin III*, 837 F.2d at 558.

Under the *Miller* Court's interpretation of the First Amendment, obscene speech "must, taken as a whole, appeal to the prurient interest, must contain patently offensive depictions or descriptions of specified sexual conduct, and on the whole have no serious literary, artistic, political, or scientific value." *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 501 (1985). See *Pope* v. *Illinois*, 481 U.S. 497 (1987); *Miller*, 413 U.S. at 24. It is that familiar definition of "obscenity," with patent offensiveness and prurient appeal judged according to "contemporary community standards" (*Miller*, 413 U.S. at 24), that is incorporated in Section 223(b). "Indecent speech" is a broader category, not restricted by the requirements that the speech, taken as a whole, appeal to prurient interest and have no serious literary, artistic, political, or scientific value. Thus, language is indecent within the meaning of Section 223(b) if it "'describes, in terms patently offensive as measured by contemporary community standards for the * * * medium, sexual or excretory activities and organs.'" *Pacifica*, 438 U.S. at 732 (quoting FCC definition). See *id.* at 739-741;

id. at 743 (opinion of Stevens, J.) ("patently offensive references to excretory and sexual organs and activities" (footnote omitted)).[12]

1. In the ruling at issue in No. 88-525, the district court struck down under the First Amendment Section 223(b)'s prohibition of indecent commercial interstate telephone communications. The court so ruled because it found inapplicable this Court's analysis in *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), which upheld the Commission's prohibition of the broadcast of indecent material on daytime radio, relying principally on the measure's aim of protecting children against such material. This Court should reverse the district court's ruling. Applying the analysis of *Pacifica* to the telephone context, and carefully examining the special problems presented by the medium before it, as *Pacifica* itself did for broadcasting (*id.* at 748-751), the Court should uphold Section 223(b)'s prohibition of indecent dial-a-porn.

Like *Pacifica*, this case involves a federal effort to prevent children from being exposed to indecent speech through a particular interstate communications technology that presents special dangers of such exposure. Congress has a compelling interest in taking effective measures to protect children from the harmful effects of indecent as well as obscene speech when that speech is readily accessible to children in the home through telephones. After extensive consideration

---

[12] The Commission in *Pacifica* described its concept of indecent speech as meaning language that "'describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.'" 438 U.S. at 732. For analytic purposes, the time of day qualification is best viewed not as part of the definition of indecent speech but as a factor in the analysis of the validity of the restriction. See *id.* at 740 & nn.14, 15.

In upholding the Commission's proscription of a particular broadcast as indecent, the *Pacifica* Court implicitly rejected a vagueness challenge to the term "indecent" as based on patent offensiveness. See *Action for Children's Television* v. *FCC*, 852 F.2d 1332, 1338-1339 (D.C. Cir. 1988).

illuminated by the FCC's experience in this area, Congress determined that there is no technological solution that can ensure that children would not gain access to such telephone pornography. That determination, together with the fact that adults may obtain indecent recorded messages by other means that do not pose the same danger of children's access, is sufficient to sustain Section 223(b)'s ban on obscene and indecent commercial interstate telephone communications against Sable's facial challenge.

2. In the ruling at issue in No. 88-515, the district court held that Section 223(b)'s prohibition against obscene interstate commercial telephone messages is constitutional. That ruling is manifestly correct. It is well established that obscenity is outside the protection of the First Amendment. See, *e.g.*, *Roth* v. *United States*, 354 U.S. 476, 484 (1957).[13] And contrary to Sable's argument, Section 223(b) is not subject to facial challenge on the ground that it unconstitutionally incorporates national (as opposed to local) standards for obscenity and therefore actually proscribes speech that may not constitutionally be proscribed as obscene.

Section 223(b) does not contravene the "contemporary community standards" requirement of *Miller* v. *California*, 413 U.S. 15 (1973). Neither *Miller* nor any other decision of this Court states whether, in an inherently national technological medium like the interstate telephone network, obscenity may be defined according to broader than local standards. Of course, Sable's challenge is meritless if national standards of some kind are constitutionally appropriate. But the question whether national or local standards are permissible in this setting need not and should not be

---

[13] Although much (perhaps most) of the speech on dial-a-porn may be obscene under the *Miller* standard (see *Carlin Communications, Inc.* v. *South Central Bell Tel. Co.*, 461 So.2d 1208, 1215-1216 (La. App. 1984)), it has not been disputed in this case that Sable also sells indecent speech, or would do so if permitted (especially if prohibited from selling obscene speech).

answered in Sable's facial challenge here. As we have noted, Section 223(b) incorporates whatever standards *Miller* and the Constitution require. It is a sufficient answer to Sable's facial challenge that Section 223(b), in future applications, will be construed according to the requirements of the First Amendment.

Moreover, if the Constitution requires obscenity to be defined according to local community standards, enforcement of Section 223(b) can fully accommodate the need to apply such standards. Criminal prosecutions under Section 223(b) would be tried in local district courts, typically to local jurors, who would draw on the knowledge of their own community in applying the *Miller* standards. *Hamling* v. *United States*, 418 U.S. 87, 105 (1974). And the Commission's administrative forfeitures, which are now far less significant than the available criminal penalties, are ordinarily to be enforced through a de novo trial in a local district court. See 47 U.S.C. 504(a). Both enforcement mechanisms involve a local decisionmaker who is well situated to apply local standards. In any event, an as-applied challenge is the proper means for alleging deficiencies in the application of Section 223(b), including any alleged deficiencies in the guidance Section 223(b) gives to the Commission.

Section 223(b)'s ban on obscene communications is not facially invalid on the ground that dial-a-porn providers like Sable may feel compelled to tailor their messages to the least tolerant community. Of course, the application of a standard based on broader than local communities would not cause that problem and in that respect would be more favorable to dial-a-porn providers than the application of local standards. But even if local standards must be used in applying Section 223(b), there is no infirmity in the statute, for Sable's tailoring obligation is simply the inevitable consequence of the inherently national character of the telephone network. Those who choose to furnish potentially obscene

messages in communities across the nation must be prepared to comply with the standards of each of those communities.

Finally, even if this Court were to hold Section 223(b)'s ban on indecent interstate commercial telephone messages invalid, the application of Section 223(b) to obscene speech would not be invalid, because the obscenity prohibition is plainly severable. The prohibition of obscenity may be enforced independently of the ban on indecency. Moreover, the language and legislative history of the statue, both before and after its most recent amendment, show clearly that Congress would have intended the ban on obscene dial-a-porn to survive even if the ban on indecent dial-a-porn were struck down. See *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 684 (1987).

ARGUMENT

I. SECTION 223(B)'S PROHIBITION OF INDECENT COMMERCIAL INTERSTATE TELEPHONE COMMUNICATIONS IS CONSTITUTIONAL ON ITS FACE

The district court erred in striking down Section 223(b)'s indecency prohibition as overbroad and hence facially invalid.[14] As this Court has made clear, facial invalidation

---

[14] When Congress was considering the bills that led to the enactment of the first 1988 amendment to Section 223(b), the FCC General Counsel pointed out to Congress that the FCC had "consistently regarded a total ban on the dissemination of indecent, but not obscene, material to be beyond the bounds permitted by *Pacifica*." *1987 Hearing* 246 (letter of FCC General Counsel). See also *id.* at 250. The FCC General Counsel also testified that "there may be serious problems in sustaining the constitutionality" of the indecency portion of what became Section 223(b). *Id.* at 213. In addition, the United States Attorney for the District of Utah informed Congress that he was "of the opinion that an outright ban of indecent dial-a-porn messages would likely be found unconstitutional by the courts." *Id.* at 258.

Those statements—as predictions of likely judicial rulings and an acknowledgement that *Pacifica* does not by its terms cover the telephone ban at issue here, but would require an extension to reach this case—are not necessarily inconsistent with the view that Section 223(b) should be

for overbreadth is "strong medicine" to be used "with hesitation, and then only as a last resort." *New York* v. *Ferber*, 458 U.S. 747, 769 (1982) (internal quotation marks omitted). The potential for some troublesome applications is not enough. A statute can be found overbroad only if it has a "substantial number of impermissible applications." *Id.* at 771. See also *New York State Club Ass'n, Inc.* v. *City of New York*, No. 86-1836 (June 20, 1988), slip op. 8, 11; *Board of Airport Comm'rs* v. *Jews for Jesus, Inc.*, No. 86-104 (June 15, 1987), slip op. 4-5; *Houston* v. *Hill*, No. 86-243 (June 15, 1987), slip op. 6-7; *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 501 (1985); *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973). Section 223(b) passes that test as applied to the dial-a-porn at issue in these cases: the statute permissibly prohibits Sable's explicitly sexual, patently offensive prerecorded commercial interstate telephone messages.[15]

---

sustained as enacted. In any event, it is our position in this Court that the constitutionality of Section 223(b) should be upheld based on the determinations that Congress made in enacting it.

[15] For the reasons that follow, Section 223(b) is valid as applied to all indecent speech—patently offensive descriptions of sexual or excretory functions or organs. Because Sable's challenge is a facial one, however, it is important to note that, from all that appears, virtually all of Sable's "frankly sexual" messages not only meet the definition of "indecent speech" incorporated in Section 223(b) but also, taken as a whole, appeal to the prurient interest. Certainly the dial-a-porn services are sold on that basis. There is no reason to believe that *any* of Sable's services, let alone a substantial portion of them, include speech that does not appeal to the prurient interest, such as, perhaps, the George Carlin monologue that was at issue in *Pacifica*. The speculative possibility of such an application of Section 223(b), therefore, is not a ground for invalidating Section 223(b) on its face. Any such application should await an as-applied challenge.

Similarly, that Section 223(b) also applies to live two-way communications (see note 3, *supra*) does not support Sable's facial overbreadth challenge, whatever the validity of Section 223(b) as applied to such communications. First, there is no evidence that two-way communications constitute a "substantial" portion of Section 223(b)'s applications.

No decision of this Court specifies a particular test for First Amendment validity in the circumstances presented here. The Court has stated that "[w]here a government restricts the speech of a private person, the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest." *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U.S. 530, 540 (1980). But in *Consolidated Edison* and in earlier and subsequent decisions applying that compelling purpose/narrow tailoring test, the speech covered was political speech or, more generally, speech on issues of public concern. See, *e.g.*, *Boos* v. *Barry*, No. 86-803 (Mar. 22, 1988), slip op. 7-8; *Perry Education Ass'n* v. *Perry Local Educators Ass'n*, 460 U.S. 37, 45-46 (1983); *First Nat. Bk.* v. *Bellotti*, 435 U.S. 765, 786 (1978). Moreover, the Court has repeatedly noted the political or public-issue character of speech in explaining why restrictions on such speech are subject to "the most exacting scrutiny" under that standard. *Boos* v. *Barry*, slip op. 7; see, *e.g.*, *Frisby* v. *Schultz*, No. 87-168 (June 27, 1988), slip op. 4 (such speech is at the "core" of the First Amendment); *Hustler Magazine, Inc.* v. *Falwell*, No. 86-1278 (Feb. 24, 1988), slip op. 4 ("heart" of the First Amendment). The patently offensive, explicitly

---

In any event, the overbreadth doctrine applies only where protected speech would be deterred by an overbroad restriction, and no such deterrence occurs where persons subject to the restriction can easily distinguish the validly proscribed speech from protected speech. Here, the two-way services are readily identifiable as distinct from prerecorded messages. Therefore, the overbreadth doctrine's concern with deterrence of speech that speakers would find hard to distinguish from proscribable speech has no application in the present context. See *Secretary of State of Maryland* v. *Joseph H. Munson Co.*, 467 U.S. 947, 964-965 (1984) (overbreadth analysis asks if the statute applies to an "easily identifiable" category of proscribable speech); L. Tribe, *American Constitutional Law* §12-28, at 1024 (2d ed. 1988) (overbreadth doctrine applies where "deterrence of protected activities is substantial").

sexual speech sold by Sable, of course, is a far cry from speech on issues of public concern.

Plurality opinions in this Court have expressly stated that certain kinds of sexual speech, although not obscene and therefore not wholly outside the protection of the First Amendment, may more readily be restricted than, for example, speech on public issues. The plurality in *Pacifica*, 438 U.S. at 743, stated that patently offensive sexual and excretory speech "surely lie[s] at the periphery of First Amendment concern."[16] Similarly, the plurality in *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976), distinguished sexually explicit but non-obscene speech from "ideas of social and political significance" (*id.* at 61) and stated of the former (*id.* at 70): "it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate." Cf. *Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 49 n.2 (1986) (citing and quoting in a parenthetical the passage from *American Mini Theatres* plurality).

The foregoing furnishes authority for application in the present setting of a First Amendment standard less "exacting" (*Boos*, slip op. 7) than the compelling purpose/narrow tailoring standard, or of a less rigid application of that standard, one that gives Congress a comparatively wide berth in making judgments about the social harms caused by indecent commercial speech on the telephone network and the feasibility of less restrictive alternatives. Even under the compelling purpose/narrow tailoring standard, however, Section 223(b) survives Sable's First Amendment challenge. For essentially the same reasons, Section 223(b) is also valid under the approach taken by the majority portion of the lead

---

[16] The plurality added (438 U.S. at 743 n.18): "A requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication. There are few, if any, thoughts that cannot be expressed by the use of less offensive language."

opinion in *Pacifica*, which, without formulating a particular test for First Amendment validity, directly analyzed the governmental interests being pursued, the distinctive aspects of the medium at issue, the relation of the restriction to the governmental interests, and alternative sources from which adults may obatin indecent speech. 438 U.S. at 748-751. In brief, Section 223(b)'s ban on indecent as well as obscene interstate commercial telephone communications, far from being overbroad, is a "precisely drawn means of serving a compelling state interest" (*Consolidated Edison Co.*, 447 U.S. at 540), because it is the only effective way of protecting all children from the harmful effects of telephone pornography.

A. Congress Has A Compelling Interest In Preventing Children From Obtaining Access To Indecent As Well As Obscene Telephone Pornography

"A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies." *Prince* v. *Massachusetts*, 321 U.S. 158, 168 (1944). Accordingly, this Court has long recognized that the government has a "compelling" interest in "'safeguarding the physical and psychological well-being'" of children. *New York* v. *Ferber*, 458 U.S. at 756-757 (citation omitted). As a result, "[t]his Court's First Amendment jurisprudence has acknowledged limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may include children." *Bethel School District No. 403* v. *Fraser*, 478 U.S. 675, 684 (1986). See *Interstate Circuit, Inc.* v. *Dallas*, 390 U.S. 676, 690 (1968) ("because of its strong and abiding interest in youth, a State may regulate the dissemination to juveniles of, and their access to, material objectionable as to them, but which a State clearly could not regulate as to adults"). Thus, the Court has held that bookstores and movie theatres may be prohibited from making indecent, non-obscene material available to children,

Ginsberg v. *New York*, 390 U.S. 629 (1968), and that radio stations may be prohibited from broadcasting indecent, non-obscene material when there is a risk that children are in the audience, *Pacifica*, *supra*. See also *New York* v. *Ferber*, *supra* (persons may be prosecuted for distributing pornographic materials using depictions of sexually explicit conduct by children even though such materials might not be legally obscene).

The Court's decision in *Pacifica*, which upheld the FCC's authority to prohibit the afternoon radio broadcast of a comedy monologue containing indecent speech, is of course centrally important to evaluating the constitutionality of the congressional ban on indecent commercial telephone speech here. The Court there reasoned that "special treatment of indecent broadcasting" is "amply justif[ied]" by the "ease with which children may obtain access to broadcast material," coupled with "the government's interest in the 'well-being of its youth' and in supporting 'parents' claim to authority in their own household.'" 438 U.S. at 749-750 (quoting *Ginsberg* v. *New York*, 390 U.S. at 639, 640). The same is true with respect to the telephone medium at issue in the present setting.[17]

Like radio and television, the telephone is a technological means of distributing messages into the home that is "uniquely accessible to children." *Pacifica*, 438 U.S. at 749. The telephone is as much a fixture in modern American homes as radio and television. See Bureau of the Census, *Statistical*

---

[17] This Court has stated that "each medium of expression presents special First Amendment problems" (*Pacifica*, 438 U.S. at 748) and that the government's interests in regulating broadcasting do "not readily translate into a justification for regulation of other means of communication" (*Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 74 (1983)). Those cautions, however, mean only that careful analysis of the particular medium at issue is necessary before the reasoning of *Pacifica* is extended beyond the broadcasting medium. Here, as we shall show, the factors relied on in *Pacifica* fully support the ban on indecent and obscene commercial telephone communications.

Abstract of the United States 1988 523 (108th ed. 1988) (92.5% of households have telephone service; 99% have radios and 87.4% have television). Children are taught to use the telephone at an early age, and even for relatively young children, dialing a telephone is as easy as turning on a radio or television set. Moreover, the aggressive marketing techniques of companies like Sable make dial-a-porn telephone numbers readily available to minors. See 134 Cong. Rec. H1699 (daily ed. Apr. 19, 1988) (statement of Rep. Coats) (dial-a-porn companies "use indiscriminate marketing strategies, place fliers on windshields, indiscriminately flier neighborhoods, and spread the telephone numbers around to anyone without regard to age"); *1987 Hearing* 18 (statement of Rep. Coats). From the perspective of parents trying to maintain "authority in their own household to direct the rearing of their children" (*Ginsberg* v. *New York*, 390 U.S. 639 (noting that such authority is "basic in the structure of our society")), what this Court said of indecent broadcasting in *Pacifica* carries over to indecent telephone speech: it "confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." *Pacifica*, 438 U.S. at 748 (citation omitted). See also *Frisby* v. *Schultz*, slip op. at 9-10.

The similarity of dial-a-porn providers and broadcasters is underscored by the fact that telephone sex services are typically designed so that messages can be provided to many callers at the same time. The Second Circuit observed in *Carlin II* (787 F.2d at 850) that, in New York, for example, "over 7,900 callers can be connected simultaneously to the same recorded message and the system as a whole can handle over 400,000 calls per hour." Given that capability, the dial-a-porn provider in effect "broadcasts" its messages, though it uses the telephone system rather than radio and

television frequencies (or cablecasting).[18] Cf. *Carlin Communications, Inc.* v. *Mountain States Tel. & Tel. Co.*, 827 F.2d 1291, 1294 (9th Cir. 1987), cert. denied, No. 87-1479 (Apr. 25, 1988).

The problem of access by children is, of course, not obviated by the fact that a caller must voluntarily dial a telephone number in order to receive a dial-a-porn service. Indeed, it was the fact that children might voluntarily dial such services that concerned Congress. Children have a natural curiosity about sex and adult behavior but are "not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." *Ginsberg* v. *New York*, 390 U.S. at 649-650 (Stewart, J., concurring in the result). See *Parham* v. *J.R.*, 442 U.S. 584, 603 (1979) ("Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions * * *.") See generally *Thompson* v. *Oklahoma*, No. 86-6169 (June 29, 1988), slip op. 7-8 n.23 (opinion of Stevens, J.). In its practical effect, indecent speech available on the telephone is an insidious form of "attractive nuisance" for children: it is a 24-hour-a-day, 7-day-a-week temptation that is available at the touch of a few buttons (or turns of a dial) at home, at a friend's house, or at any public telephone. See Note, *Recorded Message Industry*, 72 Va. L. Rev. at 1343-1344.

The ability of parents to prevent their children from gaining access to indecent communications is severely limited.

---

[18] Indeed, by using the nationwide telephone system, dial-a-porn providers free themselves of the physical constraints that limit the geographical reach of individual broadcast stations. As long as local telephone companies do not all block interstate calls, persons in any part of the country have the ability to call a dial-a-porn provider. One consequence of such nationwide access is that time-of-day restrictions are necessarily of quite limited effectiveness in preventing children from obtaining access to dial-a-porn, because children in one time zone have the ability to call a provider in another.

Monthly bills may provide some information about children's calls, but that information is limited and is received long after the calls have been made.[19] It is almost impossible (without routinely listening in on an extension) for parents to monitor their children's telephone conversations. The difficulty of parental supervision is magnified by the fact that "a young person needs to be unsupervised for only about ninety seconds" in order to hear a dial-a-porn message. *Carlin I*, 749 F.2d at 121. In addition, children can obtain access to such messages from telephones outside the home. As both Congress and the Commission concluded, neither access codes nor scrambling nor any other device so far developed can enable parents to prevent children's access. In these circumstances, government may legitimately step in. See *Ginsberg* v. *New York*, 390 U.S. at 640 ("'While the supervision of children's reading may best be left to their parents, the knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of material to them.'"); cf. *Schall* v. *Martin*, 467 U.S. 253, 265 (1984) (where "parental control falters, the State must play its part as *parens patriae*").

---

[19] A parent's receipt of information in the telephone bill at the end of the month does not enable the parent to prevent or to cure the harm inflicted on children who have listened to sexually explicit messages during the month. See Note, *Recorded Message Industry*, 72 Va. L. Rev. at 1341 n.99 (noting that a young San Francisco caller made enough 976 calls during a single month to fill up 100 pages of his grandfather's telephone bill). Cf. *Pacifica*, 438 U.S. at 748-749 (footnote omitted) ("To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow. One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place."). *Pacifica* itself was based on a complaint made by a father who heard the broadcast while driving with his young son. That the father was able to turn the dial did not change the Court's conclusion that the broadcast could be prohibited. See 438 U.S. at 730.

Here, Congress acted based on its finding that the ready availability of graphic sexual messages was having "devastating impacts on children." 134 Cong. Rec. H1713 (daily ed. Apr. 19, 1988) (statement of Rep. Coats). See *id.* at S4377 (Apr. 20, 1988) (statement of Sen. Hatch) (dial-a-porn is a "problem which considerable evidence has shown is detrimental to [the] physical, intellectual, and moral well-being" of children). As Rep. Coats stated, "[r]ecords show that a substantial portion of the calls that are made are made by young children, children of very impressionable ages that hear graphically pornographic material that leaves a vivid impression on them. Experts have testified that such messages can cause drastic changes in behavior in some of those young people." *Id.* at H1699 (daily ed. Apr. 19, 1988).[20]

In short, these cases, like *Pacifica*, involve indecent speech that Congress specifically determined to be harmful to minors. And these cases, like *Pacifica*, involve a technological medium of communication that intrudes into the home and is readily accessible to minors. In these circumstances, it is just as legitimate for Congress to take special measures

---

[20] One clinical psychiatrist noted that a child's exposure to dial-a-porn messages may lead to various psychological complications, such as premature sexual arousal, gross misunderstandings of human sexuality, and confusion about sexual values. Because children often view the telephone as an authoritative source of information, they may develop a fascination with what they hear and attempt to imitate adult behavior by acting out sexual messages with other children. Declaration of Dr. Victor B. Cline, ¶3.i, 3.j, attached as Exh. F to Gov't's Opp. to Plaintiff's Motion for Prelim. Inj. Congress was aware of two disturbing incidents involving children and telephone pornography in California alone. In one, a 12-year-old boy admitted having oral sex with a 4-year-old girl after hearing dial-a-porn messages on a church telephone. In the other, two boys (ages 15 and 11) sexually molested a 10-year-old girl after the three listened to dial-a-porn messages and repeated what they had heard to each other. See 133 Cong. Rec. S16,794-S16,795 (daily ed. Dec. 1, 1987) (statement of Sen. Helms); see also 134 Cong. Rec. S4377-S4378 (daily ed. Apr. 20, 1988) (statement of Sen. Helms).

to prevent minors' access to such speech through the particular medium of interstate telephones as it was for the FCC, pursuant to its authority to enforce 18 U.S.C. 1464, to take steps against indecent broadcasting for that purpose in *Pacifica*.

B. Congress Reasonably Determined That An Across-The-Board Ban Is The Only Effective Means Of Preventing Children's Access to Telephone Pornography

Whereas *Pacifica* involved only a daytime broadcasting ban, Section 223(b) bans commercial interstate indecent telephone communications at all hours. Whatever the validity of such a more comprehensive restriction in the broadcasting context,[21] a question that *Pacifica* expressly did not reach (438 U.S. at 750 n.28), the ban is valid in the setting presented in these cases. Congress legitimately concluded that no lesser measure would protect all children from the harmful effects of the availability by telephone of patently offensive sexual messages.

In 1983, Congress had sought to preclude access by children to dial-a-porn by instructing the FCC to devise methods of removing children from the dial-a-porn audience while permitting adults to continue to obtain access to such messages. 47 U.S.C. 223(b)(2) (Supp. IV 1986). In 1988, Congress revisited the issue in light of the FCC's four-year effort to promulgate maximally effective, valid regulations. Although the Commission had adopted regulations pursuant to the legislative mandate (see *Carlin III*, 837 F.2d at 555), Congress came to the conclusion, based on the interests at

---

[21] Section 608 of the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1989, Pub. L. No. 100-459, §608, 102 Stat. 2228, requires the FCC to prohibit indecent television broadcasts pursuant to 18 U.S.C. 1464 "on a 24 hour per day basis." That requirement and the FCC's implementing rule are being challenged in *Action for Children's Television* v. *FCC*, No. 88-1916 (D.C. Cir. filed Dec. 30, 1988), stay granted, Jan. 23, 1989.

stake and the state of technology, that access by children to telephone pornography could not adequately be prevented without prohibiting such pornography altogether.

While lesser means might accomplish the task for the sale of adult books and movies, Congress concluded that there is simply no "technological solution" that could sufficiently separate the audience of children from the audience of adults at the point of commercial sale—that there is no feasible way to prohibit indecent commercial telephone messages for one and not the other. 134 Cong. Rec. H1691 (daily ed. Apr. 19, 1988) (statement of Rep. Bliley) ("We looked for effective alternatives to a ban—there were none."). See sources cited at page 13, *supra*. In other words, the dial-a-porn provider, like the broadcaster in *Pacifica*, "cannot reach willing adults without also reaching children." 438 U.S. at 758-759 (Powell, J., concurring in part and concurring in the judgment). And, given the nature of the telephone system, the lesser measures proposed by the FCC in its rulemaking proceedings, effective as they were, could not achieve the valid end of precluding access by minors altogether.[22]

---

[22] This remains true even in those few recent instances in which local telephone companies have made the necessary investments, required all dial-a-porn services within their local service areas to be provided on a separate, blocked exchange, and required customers to notify the phone company if they wish the exchange unblocked for their phones. See *Fabulous Assocs., Inc.* v. *Pennsylvania Pub. Utility Comm'n*, 693 F. Supp. 332, 339 (E.D. Pa. 1988) (Bell Tel. Co. of Penna.). In that situation, it is still possible for children to gain access to dial-a-porn services provided locally by using unblocked phones outside their home (see *Second Report*, 50 Fed. Reg. at 42,703) and to gain access to dial-a-porn messages provided elsewhere by using even their own blocked telephones to make interstate calls to dial-a-porn providers located in areas served by phone systems that have not instituted interstate blocking.

The district court acknowledged that the government's interest in protecting children from dial-a-porn is "unquestionably * * * legitimate," but it determined that Section 223(b)'s "flat-out ban of indecent speech" is not "narrowly drawn" to protect that interest. J.S. App. A3. That conclusion is incorrect. Section 223(b) does not ban all indecent speech for adults, and it is not overbroad given the ready access that young children have to telephones and the insufficiency of lesser measures.

Section 223(b) restricts the method by which indecent telephone communications may be distributed, but it does not prohibit the dissemination of indecent messages entirely. Even aside from the "interstate" and "commercial" limitations on Section 223(b)'s reach,[23] it is significant that Section 223(b) is a restriction only on the telephone medium. Adults remain free to purchase recordings containing the identical messages at book or record stores, where access to minors is much more easily restricted. The Court in *Pacifica* found the availability of such alternative sources significant. See 438 U.S. at 750 n.28 ("[a]dults who feel the need may purchase tapes and records * * * to hear these words").

Second, the court's conclusion that the statute is not narrowly drawn is fundamentally inconsistent with Congress's determination, based on the FCC's four-year experience

---

[23] There is no doubt that Sable is in the business of providing dial-a-porn messages for a fee to callers from both inside and outside the State of California and, therefore, that Sable makes interstate telephone communications "for commercial purposes" within the meaning of Section 223(b). Because of the particulars of the billing arrangements between Pacific Bell and its long-distance telephone companies, it may be that Sable receives no *direct* revenue from out-of-state calls. But that does not require a contrary conclusion. If nothing else, Sable's interstate business helps to market its intrastate business, and it is thus the kind of "advertising or promotional activit[y]" that was expressly within the contemplation of Congress when it enacted the commercial purposes requirement. See 129 Cong. Rec. H10,559 (daily ed. Nov. 18, 1983) (remarks of Rep. Bliley). Accord *id.* at S16,867 (remarks of Sen. Trible).

receiving comments on and drafting and defending regulations, that children would continue to gain access to pornographic messages as long as commercial enterprises continued aggressively to distribute such messages over the national telephone system—even with FCC regulations requiring the use of access codes, scrambling devices, and credit cards. That congressional determination is entitled to substantial deference. See *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985); *Rostker* v. *Goldberg*, 453 U.S. 57, 83 (1981). It is, moreover, directly supported by the FCC's determinations that "[n]o method guarantees that some enterprising minors will never hear the messages" (*Second Report*, 50 Fed. Reg. at 42,706 n.54) and that "absolute impossibility of access to [dial-a-porn] services * * * is not feasible" (*Third Report*, 2 F.C.C. Rcd at 2724 n.14). The pervasiveness of the access that children have to telephones means that an outright ban *is* the narrowest alternative available to prohibit access to dial-a-porn by all children.

For those reasons, the Court's decision in *Butler* v. *Michigan*, 352 U.S. 380 (1957), does not support the district court's ruling here. Because of the availability of alternative sources of indecent speech, Section 223(b) does not reduce "the adult population" to hearing "only what is fit for children." *Butler* v. *Michigan*, 352 U.S. at 383.[24] Moreover, the law at issue in *Butler* was a sweeping prohibition on the sale of adult books altogether. That prohibition was needlessly overbroad, because less restrictive means were available for separating adults from children at the point of sale—namely, requiring the booksellers to sell only to adults. That is not so in the present setting. Just as "the broadcaster cannot reach willing adults without also reaching children" (*Pacifica*, 438 U.S. at 758-759 (Powell, J., concurring in part and concurring in the judgment)), so too with prerecorded messages on

---

[24] The Court in *Pacifica* distinguished *Butler* on the same ground. See 438 U.S. at 750 n.28.

the telephone network. There is no person checking the age of callers before the message is transmitted; and in any event, unlike a bookseller's ability to screen customers (by sight and other means, such as requiring drivers' license identification), the ability to screen customers over the telephone would be seriously limited. In these circumstances, Congress determined that there is no sufficiently reliable way to separate children from adults among the customers.

II. SECTION 223(B)'S BAN ON OBSCENE INTERSTATE COMMERCIAL TELEPHONE MESSAGES IS CONSTITUTIONAL AND SHOULD BE UPHELD

A. Section 223(b)'s Prohibition Of Obscene Commercial Speech Is Consistent With The First Amendment

This Court has repeatedly held that obscene speech is not protected by the First Amendment. See, *e.g.*, *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. at 497; *Miller* v. *California*, 413 U.S. at 23. As the Court observed in *Roth* v. *United States*, 354 U.S. 476, 485 (1957), punishment of the commercial distribution of such speech has "'never been thought to raise any Constitutional problem'" even as to consenting adults. See *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49 (1973). Accordingly, insofar as Section 223(b) prohibits interstate commercial telephone messages that are obscene, it stifles no speech that is protected by the First Amendment.[25]

Sable nevertheless challenges Section 223(b) on the ground that it unconstitutionally incorporates national, as opposed to local, standards for determining obscenity and that it therefore actually proscribes speech that may not constitutionally be proscribed as obscene. Sable's argument rests on the assertion that, under the First Amendment as

---

[25] Indeed, prior to being amended in 1988 to prohibit obscene commercial interstate telephone messages, Section 223(b) stood as the only federal statute that attempted merely to regulate rather than ban the commercial distribution of obscenity. The 1988 amendment brought Section 223(b) into line with other federal obscenity statutes.

construed in *Miller* v. *California*, *supra*, the category of unprotected obscenity must be defined by reference to local community standards. According to Sable, Section 223(b) violates that requirement. 88-515 J.S. 11-16. The district court properly rejected this argument for holding Section 223(b) invalid on its face. J.S. App. A4.

1. The premise of Sable's argument—that the First Amendment requires obscenity to be defined according to local standards—is open to question in the present setting. *Miller* itself referred to "contemporary community standards." 413 U.S. at 24. And, as the Court elaborated in *Hamling* v. *United States*, 418 U.S. at 104-105, *Miller* by its own terms did not intend to require as a constitutional matter the use of any precise geographic area in making an obscenity determination. Moreover, neither *Miller* nor any other obscenity decision of this Court involved an inherently national technological medium like the interstate telephone network. Accordingly, it is an open question whether some kind of national community standard may be used to define obscenity where the speech is, as here, necessarily available simultaneously throughout the nation.[26]

A number of considerations would support the use of broader than local standards, at least in ordinary Commission proceedings. Sable's complaint that it must comply with the standards of the least tolerant communities in the nation would dissolve if obscenity were defined by, for example, an average or prevalent national standard. Moreover, the use of a national community standard would fit

---

[26] The Court recently noted in *Fort Wayne Books, Inc.* v. *Indiana*, No. 87-470 (Feb. 21, 1989), slip op. 13, that "'community standards' may vary from jurisdiction to jurisdiction where different predicate obscenity offenses allegedly were committed." That statement by its terms contemplates only that obscenity standards "may vary" in sundry jurisdictions where "different" obscenity offenses are committed in those jurisdictions. *Fort Wayne* did not involve, and the Court had no occasion to address, the question of defining "obscenity" where a single message is distributed simultaneously throughout the nation.

with the inherently national nature of the medium; and as the Commission explained in recent administrative proceedings (J.S. App. J31-J32), such a standard would serve the "community standard" requirement's purpose of ensuring that "material is judged neither on the basis of each juror's personal opinion, nor by its effect on a particularly sensitive or insensitive person or group." *Hamling* v. *United States*, 418 U.S. at 107. Furthermore, as the Commission also explained, at least in administrative enforcement proceedings where there is no formal hearing in which evidence of local standards is taken, the Commission's "ability to apply a standard based on a community outside of Washington, D.C., would appear to be somewhat limited." J.S. App. J33. See also 129 Cong. Rec. H10,560 (daily ed. Nov. 18, 1983) (remarks of Rep. Bliley) ("The Commission should exercise care that it does not misrepresent Supreme Court cases by inserting local before community standards.").

2. This Court, however, need not and should not resolve in these cases whether Section 223(b) does or may constitutionally incorporate broader than local standards for determining obscenity. As we have explained (see page 18, *supra*), while Section 223(b) itself does not define the term "obscenity," the legislative history makes clear that Congress intended the term to be interpreted to incorporate the standards required by the First Amendment as construed in *Miller*. See, *e.g.*, 134 Cong. Rec. S13,427 (daily ed. Sept. 28, 1988) (remarks of Sen. Biden); 134 Cong. Rec. E1111 (daily ed. Apr. 19, 1988) (statement of Rep. Dannemeyer); 129 Cong. Rec. E5966 (daily ed. Dec. 14, 1983) (statement of Rep. Kastenmeier); *id.* at H10,560 (daily ed. Nov 18, 1983) (statement of Rep. Bliley). Hence, even if the First Amendment calls for the use of local standards for determining obscenity, Section 223(b) is not facially invalid, because in future applications it can and must be construed to incorporate obscenity standards consistent with the First Amendment.

An important prudential consideration further counsels against this Court's reaching the question of obscenity standards under Section 223(b) in the present facial challenge. The government has not yet made any attempt to enforce any sanctions under Section 223(b) using national standards.[27] In light of the traditional reluctance of this Court to decide constitutional issues outside of a concrete factual setting, it would be inappropriate to determine the validity of using national standards in applying Section 223(b) before the Commission and lower courts have even tried to formulate and apply such standards. See, *e.g.*; *Socialist Labor Party* v. *Gilligan*, 406 U.S. 583, 588 (1972); *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 569 (1947).[28]

---

[27] The Commission initiated two administrative proceedings to impose fines against two dial-a-porn companies (which are not affiliated with Sable) for violating the 1983 version of Section 223(b). See *In the Matter of Intercambio, Inc.*, 64 Radio Reg. 2d(P&F) 1663 (Apr. 21, 1988) (reprinted at J.S. App. J); *In the Matter of Audio Enterprises, Inc.*, 64 Radio Reg. 2d(P&F), 1681 (Apr. 21, 1988) (see J.S. App. K). Neither proceeding involved a formal hearing, and the Commission stated in *Intercambio* that, in that circumstance, it would not apply the obscenity standards of any particular local community, but instead would apply a broader standard. J.S. App. J32-J33. But enforcement of the penalty in court would take place in a local district court, which, under 47 U.S.C. 504(a), would provide a de novo trial applying local standards if *Miller* so required. In any event, the Commission noted in *Intercambio* that the messages at issue were "patently offensive and * * * [went] well beyond what an average adult person *in any community* would consider to be portrayals of sexual conduct worthy of protection." *Id.* at J35 (emphasis added).

[28] We note that, under the most recent amendments to Section 223(b), the Commission no longer has the power to impose the penalties that Section 223(b)(3) authorized at the time Sable filed its jurisdictional statement. Although the FCC continues to have the power to penalize dial-a-porn providers under its general authority to impose forfeiture penalties for "willful[ ] and repeated[ ]" violations of the Communications Act (47 U.S.C. 503(b)(1)(B)), that general forfeiture authority extends only to the imposition of a $2,000 penalty for each violation, subject to a prescribed $5,000 limit (47 U.S.C. 503(b)(2)). That is a far smaller

3. In any event, Section 223(b) survives Sable's facial attack whether the statute incorporates national or local standards for obscenity. Of course, if obscenity may be defined by reference to national standards in the present setting, Sable's challenge fails by its own terms. And even if the First Amendment requires application of local community standards, Section 223(b) is valid on its face.

That the statute regulates obscenity at the federal level is in no way inconsistent with the application of local community standards. The validity of federal obscenity laws is well settled. This Court has held that Congress may enact federal laws prohibiting the mailing of obscene materials, *Hamling* v. *United States*, 418 U.S. 87 (1974), the broadcasting of obscene messages, *Pacifica*, *supra*, the movement of obscene items in interstate commerce, *United States* v. *Orito*, 413 U.S. 139 (1973), and the importation of obscene films, *United States* v. *12 200-ft. Reels of Film*, 413 U.S. 123 (1973). As observed by both the district court in these cases and the Second Circuit in *Carlin III*, Section 223(b) "does not create an impermissible national obscenity standard any more than [these other] federal laws." J.S. App. A4 (quoting *Carlin III*, 837 F.2d at 561).

Further, there is ample opportunity for Sable to insist on application of local community standards if and when an action is brought against it. Thus, a criminal prosecution under Section 223(b) would be brought in a particular federal district court and, if the defendant wishes, tried to a

---

penalty than is available in a criminal prosecution under Section 223(b). Accordingly, it is speculative whether an administrative proceeding would ever be brought against Sable; none has been brought to date. These circumstances reinforce the conclusion that any argument based on the alleged invalidity of the standards used in administrative enforcement should await an attempt to enforce the statute through an administrative proceeding, in which, both before the Commission and on review in the courts, Sable could raise its challenge. See *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. at 501 (citation omitted) (Court should not "'anticipate a question of constitutional law in advance of the necessity of deciding it'").

local jury. In such a case, *Miller* provides that a federal juror would "draw on knowledge of the community or vicinage from which he comes in deciding what conclusion 'the average person, applying contemporary community standards' would reach in a given case." *Hamling* v. *United States*, 418 U.S. at 105; accord *Smith* v. *United States*, 431 U.S. 291, 302 (1977). There is similar opportunity for application of local standards in an ordinary administrative enforcement action. If the Commission initiates an administrative forfeiture action for a penalty under 47 U.S.C. 503(b)(1)(B) based on a willful or repeated violation of Section 223(b), enforcement of the penalty takes place through a de novo trial in a district court in a particular local community. 47 U.S.C. 504(a). See J.S. App. J33-J34 (Commission decision noting that court might apply local standards in enforcing penalty).[29] Accordingly, Section 223(b) may be enforced through mechanisms that allow for the application of local community standards to determine obscenity.[30] The argument that obscenity under Section 223(b) must be judged under local community standards should await an as-applied challenge, where such standards can be applied if they are found constitutionally required. See *Carlin III*, 837 F.2d at 561.

---

[29] If the Commission were to choose to assess penalties through a formal hearing pursuant to 47 U.S.C. 503(b)(3), which it has never done in enforcing Section 223(b), evidence may be taken on local standards in the hearing, and judicial review may be in the local court of appeals. If those means were considered inadequate to ensure the application of local community standards (and such standards were required), it may be that Section 223(b) cannot be enforced by that means. But that possibility does not invalidate Section 223(b) on its face, because the other avenues for enforcing Section 223(b) remain open.

[30] The recent amendments to Section 223(b) eliminated the provisions giving the FCC and Attorney General direct civil enforcement authority. See pages 16-17, *supra*. Those enforcement mechanisms, should they be reinstituted, would provide the same opportunity to apply local standards as do the current enforcement mechanisms.

If local standards are to be applied, Section 223(b) is not rendered invalid simply because Sable may feel compelled not to offer messages that would be considered obscene by the average person in the least tolerant communities. The First Amendment and *Miller* permit prosecution of dial-a-porn providers who make telephone messages available to communities that consider them obscene. If Sable does not wish to expose itself to nationwide prosecution or penalties, it should not distribute potentially obscene materials on a nationwide basis. Sable's predicament is nothing more than the inevitable consequence of a decision to enter a business that uses a telephone network that is inherently national in reach.

At bottom, Sable claims a constitutional right to disseminate its messages to communities that would consider them obscene as long as its messages would not be considered obscene in some other community in the United States. Far from compelled by *Miller*, such a right is plainly inconsistent with that decision. As the Court stated, "[i]t is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City." 413 U.S. at 32. Similarly, the First Amendment does not require that a community in the United States endure messages from Sable that it considers obscene simply because they are simultaneously made available to persons in communities that tolerate such messages.[31]

Finally, contrary to Sable's suggestion (88-515 J.S. 14-16), Section 223(b)'s ban on obscene speech is not unconstitutionally vague, as the district court also implicitly recognized. By employing the term "obscene," Congress "la[id] down by legislative act an intelligible principle to which the

---

[31] To the extent that Sable has specific venue objections to a future enforcement action, they are appropriately raised at that time, not in a facial challenge to the statute. See *Carlin III*, 837 F.2d at 561.

[Executive] * * * is directed to conform." *J.W. Hampton, Jr. & Co.* v. *United States*, 276 U.S. 394, 409 (1928). At least since *Miller*, whose standards Section 223(b) incorporates, the word "obscene" has had a sufficiently clear legal meaning to overcome vagueness objections. *Miller*, 413 U.S. at 27; *Hamling* v. *United States*, 418 U.S. at 118 (the term is "sufficiently definite in legal meaning to give a defendant notice of the charge against him").

Moreover, the "contemporary community standard" requirement is not vague when construed to incorporate national standards, any more than it is when construed to incorporate local standards. And in any event, if national standards are to be used, any vagueness challenge is premature, as no such standards have been formulated.[32] Finally, even if such standards were found unduly vague, the remedy would not be facial invalidation of Section 223(b) but, rather, incorporation of local standards so as to comply with the First Amendment. Sable's facial attack on Section 223(b) therefore cannot be sustained on vagueness grounds.

B. The Statute's Ban On Obscene Telephone Messages Is Severable From Its Ban On Indecent Telephone Messages

The district court also properly concluded (J.S. App. A4-A5) that Section 223(b)'s ban on obscene telephone messages is severable from the statute's prohibition of indecent telephone messages. The obscenity ban can stand on its own, and there is no reason whatever to believe that Congress intended to ban obscene telephone messages only if it could also ban indecent messages. Even if the indecent-speech ban is invalid, therefore, the obscenity ban must survive.

---

[32] In *Intercambio*, *supra*, the Commission found that the messages in question were "patently offensive and * * * [went] well beyond what an average adult person *in any community* would consider to be portrayals of sexual conduct worthy of protection." J.S. App. J35 (emphasis added).

"Whether an unconstitutional provision is severable from the remainder of the statute in which it appears is largely a question of legislative intent." *Regan* v. *Time, Inc.*, 468 U.S. 641, 653 (1984) (plurality opinion); see *id.* at 692 (opinion of Powell, J.). Thus, "'"[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law."'" *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 684 (1987) (quoting *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976), quoting *Champlin Refining Co.* v. *Corporation Comm'n of Oklahoma*, 286 U.S. 210, 234 (1932)). If the constitutionally unobjectionable portion of a statute can function independently in the manner contemplated by Congress, then "the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted." *Alaska Airlines*, 480 U.S. at 685 (footnote omitted).

Section 223(b)'s ban on obscene commercial interstate telephone messages plainly can stand independently of the ban on indecent messages, and severability clearly comports with the will of Congress if the Court should hold the indecency ban invalid. See *Carlin III*, 837 F.2d at 561. First, as Congress was undoubtedly aware, the Communications Act of 1934 generally provides for severability in the "strongest possible language." *Pacifica*, 438 U.S. at 739 n.13. See 47 U.S.C. 608 ("If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the remainder • • • shall not be affected thereby"). In addition, in the most recent revision of Section 223(b), Congress deliberately placed the prohibition against obscene messages in a separate subsection from that containing the prohibition against indecent messages. See pages 3, 17, *supra*. That action confirmed what was already apparent from the use of the disjunctive "obscene or indecent" in the 1983 and Hawkins-Stafford versions of Section 223(b)—that

Congress intended the ban on obscene speech to stand independently of the ban on indecent speech. In view of Congress's focused concern about the "devastating impacts" that dial-a-porn, whether obscene or indecent, was having on young children (134 Cong. Rec. H1713 (daily ed. Apr. 19, 1988) (statement of Rep. Coats); see pages 30-31, *supra*), its expressed intent to "ban dial-a-porn in whatever possible way" (134 Cong. Rec. H1699 (statement of Rep. Coats) (daily ed. Apr. 19, 1988)), and its recognition of the separate legal analysis required for obscene and indecent speech (see sources cited pages 14, 18, *supra*), it is plain that Congress, in both the 1983 enactment and the Hawkins-Stafford Act, intended the ban on obscene dial-a-porn to remain even if—contrary to our submission—the ban on indecent dial-a-porn were held invalid.[33]

---

[33] In 1988, Rep. Bliley and other Members of Congress complained that, in their view, Section 223(b) as passed in 1983 had effectively legalized obscene and indecent telephone messages, which they believed had been unlawful prior to 1983 under Section 223(a), 47 U.S.C. 223(a). That provision states, in pertinent part, that whoever "by means of [interstate] telephone[,] • • • makes any comment • • • which is obscene, lewd, lascivious, filthy, or indecent" thereby commits a crime. Those Members disagreed with the FCC's view that Section 223(a) applies only to calls placed by the person making the proscribed remarks. Hence, Rep. Bliley stated: "[i]t was not until 1983 that obscene and indecent communications over the telephone became legal," and the purpose of the new amendments was to "restore, not change," the pre-1983 state of the law. 134 Cong. Rec. H1691, H1806 (daily ed. Apr. 19, 1988). Accord 134 Cong. Rec. E1111 (daily ed. Apr. 19, 1988). (statement of Rep. Dannemeyer). Rep. Bliley further observed that if Section 223(b) were not amended to eliminate the safe-harbor provision and to ban dial-a-porn entirely, Congress would have effectively voted "to maintain the only place in the entire United States Code where commercial obscenity is given legal protection." 134 Cong. Rec. H1709 (daily ed. Apr. 19, 1988). Those remarks reinforce the conclusion that Congress did not intend to allow obscene telephone messages to escape proscription by Section 223(b) even if that proscription could not constitutionally reach indecent communications.

CONCLUSION

The judgment of the district court holding Section 223(b) unconstitutional insofar as it applies to indecent speech should be reversed. The judgment holding Section 223(b) constitutional insofar as it applies to obscene speech should be affirmed.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General
JOHN R. BOLTON
Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
RICHARD G. TARANTO
Assistant to the Solicitor General
BARBARA L. HERWIG
JACOB M. LEWIS
Attorneys

DIANE S. KILLORY
General Counsel
Federal Communications Commission

FEBRUARY 1989

U.S. GOVERNMENT PRINTING OFFICE: 1989—241-699/00118